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No. 78-1384

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY A. PROESEL and LA SALLE NATIONAL BANK, Trustees of the Frieda Proesel Trust (a/k/a Frieda Proesel Family Trust), Transferees of the assets of the ESTATE OF FRIEDA PROESEL, Deceased; Henry A. Proesel, former executor of the ESTATE OF FRIEDA PROESEL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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NO.

HENRY A. PROESEL and LA SALLE NATIONAL BANK, Trustees of the Frieda Proesel Trust (a/k/a Frieda Proesel Family Trust), Transferees of the assets of the ESTATE OF FRIEDA PROESEL, Deceased; Henry A. Proesel, former executor of the ESTATE OF FRIEDA PROESEL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on or about the 13th day of October, 1978.

OPINIONS BELOW

The memorandum opinion and order of the District Court for the Northern District of Illinois, Eastern Division is reported informally at 77-2 USTC ¶13,217 and at 41 AFTR 2d 78-1441. The opinion of the United States Court of Appeals for the Seventh Circuit is reported informally at 78-2 USTC ¶13,262 and at 42 AFTR 2d 78-6517. Copies of the opinions of the Courts are appended to this petition in the Appendix at p. 14 and p. 1, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on or about October 13, 1978. On January 11, 1979, Mr. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTION PRESENTED

Whether gift taxes and interest paid thereon by an estate pursuant to its proper consent to split a gift tax with the surviving spouse are properly deductible pursuant to Section 2053 of the Internal Revenue Code of 1954, as amended (the "Code").

STATUTES AND REGULATIONS INVOLVED

The statutes involved are the Code, Sections 2053, 2501 and 2513 and Illinois' S.H.A. Chapter 110½, §27-7. The regulations involved are Treasury Regulations §§20.2053-3; 20.2053-4; 20.2053-6; 25.2513-2; and 25.2513-4. Because these provisions are lengthy, their pertinent text is set forth in the Appendix at p. 22 *et seq.*

STATEMENT OF THE CASE

In this lawsuit the trustees of the Frieda Proesel Testamentary Trust seek refund of estate taxes and allowance of a deduction for attorneys' fees for prosecuting the claim for refund. The District Court granted the United States' motion for summary judgment and on October 13, 1978 the United States Court of Appeals for the Seventh Circuit affirmed.

On January 2, 1964, Mrs. Proesel executed her Last Will and Testament after lengthy estate planning discussions. These discussions, which involved both Mr. and Mrs. Proesel and their attorneys, resulted in the preparation and execution of Wills, trust instruments and the completion in 1964 of lifetime gifts of property. The property which was the subject of the gifts was acquired during the marriage of Mr. and Mrs. Proesel and did not come from inheritance.

Mrs. Proesel died on August 12, 1965. As authorized by her Will and in keeping with her intent, the Executor of her Estate consented to "split gift tax" treatment for the 1964 gifts which had been made by Mr. Proesel and paid one-half of the ensuing gift tax liability with funds from the Estate.

The Executor's consent was evidenced by the filing of gift tax returns. These returns were filed pursuant to extensions which were timely requested on April 15, 1965 and granted prior to Mrs. Proesel's death. Had Mrs. Proesel not intended to split her husband's gifts and consented to do so, there would have been no reason for her to seek an extension of time within which to file a return since none would have been due from her. The returns were filed after her death.

The Executor's consent and payment of the tax was made pursuant to Article III, Section 6(p) of Mrs. Proesel's Will which authorizes her Executor

> "to join with my husband or with his personal representative in a * * * gift tax return covering any period of time for which such * * * [return has] not been filed by me, and in any manner to otherwise affirm or disaffirm the filing by my husband of a gift tax return covering any period of time for which such * * * [return] may be filed by my husband; and to pay in connection with any such return or returns such taxes, interest and penalties as to my Executor may seem proper, without the necessity of allocating any portion thereof to my husband."

This provision was specifically authorized by Illinois law. S.H.A. Chapter 110½, §27-7.

Pursuant to the provisions of Section 2513 of the Code and the regulations thereunder and the intent of Mrs. Proesel as evidenced above, Mr. Proesel filed his gift tax return signifying his consent to have the gift considered as made one-half by his deceased spouse and one-half by himself. Similarly, as Executor of Mrs. Proesel's Estate, he filed her gift tax return consenting to the split gift election.

Mr. Proesel paid on his own behalf $44,955 (plus interest) in gift tax. As Executor he paid the same amount on behalf of his wife's estate. The Government concedes that the above quoted language of Mrs. Proesel's Will authorized the Executor to consent to the split gift election, and that the treasury regulations recognize the validity of such an election by an executor, for gift tax purposes. Nevertheless the Government has denied the deduction of the properly remitted taxes for estate tax purposes.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the decision of the Court of Appeals for the Seventh Circuit should be reviewed because it creates an unconstitutional discrimination between residents of community property states and residents of common law states. Moreover, this decision is contrary to law and creates a direct conflict between Circuit Courts of Appeal. This conflict, as noted by the Court below, will cause fiduciaries and attorneys across the United States "overwhelming hardship". Unless this Court grants certiorari, Congress may be forced to pass legislation to try to achieve its goal of equality between common law and community property states, an equality thought by Congress to have been achieved thirty (30) years earlier.

1. The decision below creates an unconstitutional discrimination between residents of community property states and residents of common law states. This discrimination further violates the expressed intent of Congress with respect to the Federal tax law.

Throughout these proceedings the Government has agreed that the gift taxes and interest paid thereon by the Estate would have been deductible had the Illinois decedent and her spouse resided in a community property state rather than in a common law state. Thus, if the decision below is allowed to stand, the mere happenstance of residence will create an arbitrary discrimination in the application of our Federal gift tax laws. This discrimination in favor of residents of community property states is a violation of the due process rights of residents of common law states as guaranteed by the Fourteenth Amendment to the Constitution.

Moreover, the decision below is in contravention of the specific purpose of Congress in enacting the Revenue Act of 1948. As Congress noted, "the basic differences between community and common law interpretations of property rights have . . . resulted in geographical inequalities in the application of estate and gift taxes."[1] To prevent such an arbitrary discrimination, Congress passed the gift-splitting provisions of the Revenue Act of 1948, §374 "so that both the community-property States and the common-law States may be placed on an equal basis . . .".[2] Unless certiorari is granted the "national system for ascertaining Federal estate and gift tax liabilities"[3] adopted by Congress in 1948 will be nullified.

2. In holding that Mrs. Proesel's intent to consent to split-gift treatment was immaterial, the Seventh Circuit Court of Appeals decision is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *Jones* v. *Commissioner*, 327 F.2d 98 (4th Cir. 1964).

In its decision, the Court of Appeals for the Seventh Circuit stated that it was "immaterial that Mrs. Proesel may have intended to consent . . .". Thus, in spite of the factual background which led to the gift splitting, the specific clause in her Will incorporating the provisions of Illinois law authorizing the splitting of gifts, and her express intent to split the gifts as evidenced by her request for an extension of time for filing her 1964 gift tax return, the Court below held her "pre-death intention to consent is immaterial" *because Mrs. Proesel did not personally sign the return before her death.*

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[1] See H. Rep. No. 1273, 80th Cong., 2d Sess. (1948), reprinted in 1948-1 Cum. Bull. 241, 260.

[2] Id. at 243-244.

[3] Id. at 244.

In sharp contrast to the decision of the Seventh Circuit Court of Appeals in the instant case, the Court of Appeals for the Fourth Circuit in *Jones,* supra., held that the consent of a wife to split with her spouse had been "signified" within the meaning of §2513, *notwithstanding the fact that she failed to personally sign a gift tax return.* As noted in Mertens, *Law of Federal Gift & Estate Taxation,* citing the *Jones* case:

> "*The controlling factor is the intent* of all parties to include the consent of the donee-wife on the return: gift splitting has been allowed where such intent has been 'evident' and 'signified'." (Vol. IV Cumm. Supp. at 163.) (Emphasis Added.)

As noted by the Court of Appeals for the Fourth Circuit in *Jones,* Congress did not require a consenting spouse's *signature* on a gift tax return. Congress did require a consenting spouse's consent to be "signified".

As the Fourth Circuit Court stated:

> "If the Congress or Internal Revenue Service intended to confine signification to signature, they would have so directed, as the Service did in reference to income returns, both individual and joint. Reg. §§1.6013-1(a)(2) and 1.6061-1(a). It is also significant that as to gift-splitting the Congress chose to speak on how the consent should be expressed; it did not do so as to income returns. Over and over again both the statute and the regulations avoid the use of the word "sign". This was not an oversight. Studiedly, all that either required was that her consent be "signified", meaning to show clearly or make evident."

As previously noted, the evidence has shown that Mrs. Proesel "signified" her consent.

3. The decision below arbitrarily and capriciously reverses more than thirty (30) years of commonly accepted

practice and will require a radical modification in all estate planning. As recognized by the Court of Appeals for the Seventh Circuit below, fiduciaries all over the country (except in community property states) will now be faced with an "overwhelming hardship", a "Catch-22" situation. Congress despite its clear intent will again be forced to modify Section 2513(b) of the Code to achieve the long-sought equality between common law and community property states.

While the amount of the estate tax here involved is not of great significance, the chaos created by this decision is. Forms created and language used in existing estate planning documents to effect the intent of Congress to equalize community property and common law treatment will suddenly have to be discarded. See e.g. Rabkin and Johnson, *Current Legal Forms with Tax Analysis,* Form 8.33(16), and Prentice-Hall, *Wills—Trusts—Estate Planning Forms,* Form ¶13,051, which parallel the questioned clause in Mrs. Proesel's Will. In fact, the efficacy of state laws enacted for the same purpose will now be questioned. See, e.g., Illinois' S.H.A. Chapter 110½, §27-7.

Practitioners may attempt to overcome the decision below and achieve the long-standing intent of Congress by having the spouses execute an agreement to consider the gift as split for purposes of the Federal gift tax *at the time the gift is made.* (See e.g., Casner, *Estate Planning,* 1978 Supplement to Volume 1 at page 1348 citing the decision of the District Court below and noting such a suggestion.) However, the decision below has created a "Catch-22" situation because Section 2513(b) of the Code now provides that the consent to split the gift *may not be signified until after the close of the calender quarter in which the gift was made.*

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1072

HENRY A. PROESEL and LA SALLE NATIONAL BANK, Trustees, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73 C 167—James B. Parsons, *Judge.*

Heard September 14, 1978—Decided October 13, 1978

Before FAIRCHILD, *Chief Judge,* CUMMINGS and WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In this lawsuit the trustees of the Frieda Proesel Testamentary Trust sought a $17,711.30 (plus costs and interest) refund of estate taxes and allowance of a deduction for attorneys' fees for prosecuting the claim. The district court granted the Government's motion for summary judgment, resulting in this appeal. We affirm as to the refund.

Mrs. Proesel died on August 12, 1965. The Executor of her Estate consented to "split gift tax" treatment for certain gifts made by Mr. Proesel, as he was authorized to do by her will. He then paid half of the ensuing gift tax liability with funds from the Estate. The question presented by this case is whether the gift taxes paid by the Estate are deductible for estate tax purposes. The key clause in Mrs. Proesel's will is contained in Article III, Section 6(p), which authorizes her Executor

> "to join with my husband or with his personal representative in a * * * gift tax return covering any period of time for which such * * * [return has] not been filed by me, and in any manner to otherwise affirm or disaffirm the filing by my husband of a * * * gift tax return covering any period of time for which such * * * [return] may be filed by my husband; and to pay in connection with any such return or returns such taxes, interest and penalties as to my Executor may seem proper, without the necessity of allocating any portion thereof to my husband."

During 1964, Mrs. Proesel's husband Henry made taxable gifts of real property valued at $429,137.68 for final gift tax purposes. Because of an extension of time granted by the Internal Revenue Service, he did not file the gift tax return until January 3, 1966, several months after his wife's death, pursuant to the split gift provisions of the Internal Revenue Code (26 U.S.C. § 2513).[1] In his gift tax

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[1] Section 2513 provides in pertinent part:

"SEC. 2513. GIFT BY HUSBAND OR WIFE TO THIRD PARTY.

"(a) Considered as Made One-Half by Each.—

"(1) *In general.*—A gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or

(footnote continued)

return Mr. Proesel reported that under Section 2513 one-half of the gifts were to be considered as having been made by his deceased wife. On the same day, as Executor of his wife's estate, he filed another gift tax return consenting to the split gift election. The Government concedes that the above-quoted language of Mrs. Proesel's will authorized him to do so, and that Treasury Regulation 25.2513-2 (c) (note 14 *infra*) recognizes the validity of such an election of an executor, for gift tax purposes. Mr. Proesel paid on his own behalf $44,955 (plus interest) in gift tax and as Executor he paid the same amount on behalf of his wife's estate.

On the federal estate tax return, Mrs. Proesel's Estate sought to deduct the gift tax and interest paid by the Es-

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(footnote continued)

resident of the United States. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in section 2514(c), over such interest. For purposes of this section, an individual shall be considered as the spouse of another individual only if he is married to such individual at the time of the gift and does not remarry during the remainder of the calendar year.

"(2) *Consent of both spouses.*—Paragraph (1) shall apply only if both spouses have signified (under the regulations provided for in subsection (b)) their consent to the application of paragraph (1) in the case of all such gifts made during the calendar year by either while married to the other.

(b) Manner and time of signifying consent.—

"(1) *Manner.*—A consent under this section shall be signified in such manner as is provided under regulations prescribed by the Secretary.

"(2) *Time.*—Such consent may be so signified at any time after the close of the calendar quarter in which the gift was made, * * *."

tate pursuant to the split gift election as a claim against the Estate under 26 U.S.C. § 2053(a)(3).[2] This was disallowed by the Commissioner of Internal Revenue on the ground that the gift taxes and interest in question were not personal obligations of Mrs. Proesel at the time of her death and therefore did not fall within Section 2053(a)(3). The Estate thereafter paid the additional estate taxes claimed by the Commissioner, and the Trustees of Mrs. Proesel's Testamentary Trust filed a claim for refund. After a refund was denied, this suit was commenced.

Section 20.2053(4) of the Treasury Regulations on Estate Tax Bars the Claimed Deduction.

In the district court, both parties requested summary judgment. As noted, the Government's motion for summary judgment was granted. In the accompanying unreported memorandum opinion and order, the district court held that Mrs. Proesel's Estate may not "deduct from the estate tax return federal gift taxes which were paid by the Executor who was both the donor and the husband of decedent, after he had elected the 'split gift tax' treatment under Section 2513 subsequent to his wife's death and in accordance with the intention expressed in her will." The opinion noted that Section 2513 was designed to equalize beneficial tax treatment of gifts by married couples in common-law jurisdictions such as Illinois with that accorded gifts by married couples in community property states.

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[2] Section 2053(a)(3) provides:

> "*General Rule.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—
>
> * * * * * * *
>
> "(3) for claims against the estate * * *."

The district court refused to grant the requested refund because while Treasury Regulation 20.2053-4 states "Liabilities imposed by law * * * are deductible,"[3] Treasury Regulation 20.2053-6(d) provides that "No portion of the tax attributable to a gift in fact made by the decedent spouse is deductible except to the extent that the obligation is *enforced against the decedent's estate* * * *" (emphasis supplied).[4] The district judge concluded that the gift tax

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[3] Section 20.2053-4 of the Treasury Regulations on Estate Tax provides:

> "The amounts that may be deducted as claims against a decedent's estate are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. Only interest accrued at the date of the decedent's death is allowable even though the executor elects the alternate valuation method under section 2032. Only claims enforceable against the decedent's estate may be deducted. Except as otherwise provided in §20.2053-5 with respect to pledges or subscriptions, section 2053(c)(1)(A) provides that the allowance of a deduction for a claim founded upon a promise or agreement is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. See § 20.2043-1. Liabilities imposed by law or arising out of torts are deductible."

[4] Section 20.2053-6(d) of the Treasury Regulations on Estate Tax provides:

> "(d) *Gift taxes.* Unpaid gift taxes on gifts made by a decedent before his death are deductible. If a gift is considered as made one-half by the decedent and one-half by his spouse under section 2513, the entire amount of the gift tax, unpaid at the decedent's death, attributable to a gift in fact made by the decedent is deductible. No portion of the tax attributable to a gift in fact made by the decedent's spouse is deductible except to the extent that the obligation is enforced against the decedent's estate and his estate has no effective right of contribution against his spouse. (See section 2012 and § 20.2012-1 with respect to credit for gift taxes paid upon gifts of property included in a decedent's gross estate.)"

was not enforced against the decedent or her estate, as required by Regulation 20.2053-6(d), since she was neither the donor nor the donee of the real estate in question.[5] Although an effective consent to "split" the gift under Section 2513 makes the non-donor spouse jointly and severally liable for the full gift tax due,[6] the district court concluded that "no such liability was 'imposed' on the Estate until such time—decidedly after decedent's death—that consent to treat the matter under § 2513 was filed by the executor." Thus the Estate had no gift tax liability within the meaning of Regulation 20.2053-4. For these reasons, plaintiffs were not permitted to take the requested deduction under Section 2053(a)(3) of the Internal Revenue Code.[7]

In affirming, we rest our holding on Section 20.2053-4 of the Treasury Regulations on Estate Tax (note 3 *supra*). This Regulation was approved in *United States* v. *Stapf*,

[5] Section 2502(d) of the Internal Revenue Code specifies that gift taxes are the donor's liability. However, Section 6324(b) provides that "[i]f the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift."

[6] Section 2513(d) provides:

> "Joint and several liability for tax.
>
> "If the consent required by subsection (a)(2) is signified with respect to a gift made in any calendar quarter, the liability with respect to the entire tax imposed by this chapter of each spouse for such calendar quarter shall be joint and several."

[7] Although the district court denied plaintiffs' claim for an additional estate tax deduction for the attorneys' fees incurred in this litigation, the Government now agrees that the Estate is entitled to a deduction for reasonable attorneys' fees under Section 2053(a)(2) permitting deductions "for administration expenses" (Br. 4, n. 2). Therefore, a remand will be necessary to determine the proper amount of this deduction.

375 U.S. 118, 132, and its legality is not challenged by plaintiffs. The Regulation provides that claims against a decedent's estate are deductible only if they "represent personal obligations of the decedent existing at the time of his death." We agree with the district court that when Mrs. Proesel died in August 1965, she was not liable for any portion of the gift taxes imposed by the Internal Revenue Code on the transfers by her husband in 1964 because she was neither the donor nor the donee of such gifts, nor had she assumed liability for such tax under Section 2513 (2) (note 1 *supra*) at the time of her death.[8] Therefore, the $44,955 gift tax paid in January 1966 by her estate did not "represent personal obligations of the decedent existing at the time of [her] death" as required by Section 20.2053-4 of the Regulations.

For a contrary result, plaintiffs argue that the gift taxes paid by Mrs. Proesel's Estate were "Liabilities imposed by law" within the meaning of the last sentence of Section 20.2053-4 (note 3 *supra*) and therefore deductible. In our view, this sentence was meant to show the type of claims that are deductible and was not intended to abrogate the

[8] Plaintiffs' counsel suggested at oral argument that the holding of the district court, taken together with Section 2513(b) of the Code (note 1 *supra*), presents a "Catch-22" situation. Apparently he meant that because one cannot file the consent until after the end of the calendar quarter in which the gift was made, if one dies before the end of such a quarter his estate loses the ability to deduct any gift taxes it elects to pay under the "split gift" provisions. This is true, but if this result is perceived as an overwhelming hardship, it would be necessary for Congress to modify Section 2513(b) to allow for consents to be filed as soon as the gift is made. Certainly we may not create a judicial exception to the fundamental requirement of Section 20.2053-4 of the Treasury Regulations—already approved by the Supreme Court in *Stapf*, *supra*—that only obligations existing at the time of the decedent's death are deductible from the estate.

earlier requirement of this Section that the claims are only deductible if they represent personal obligations of the decedent existing at the time of death, whether in respect to contract, tort, tax or any other obligation imposed by law. Moreover, since the liability was assumed by the Estate voluntarily (Br. 17, 23) without any consideration,[9] this gift tax liability was not at the time of Mrs. Proesel's death "enforceable against the decedent's estate"—still another requirement of Section 20.2053-4.

In urging reversal, plaintiffs also rely on the clause "whether or not then matured" in the first sentence of Section 20.2053-4, asserting that the Executor's consent to the application of the split gift provisions should relate back and be given effect as an obligation of the decedent existing at the time of death. We disagree. In context with the rest of this Regulation, the purpose of this phrase is to permit deduction of claims against the estate if they are personal obligations of the decedent existing at the time of death whether or not they were due to be paid at the time of death.

Our interpretation of the Regulation in question is not unduly harsh. Here Mr. Proesel received the benefit of reduced gift tax rates on gifts made prior to the death of his wife even though she died before consenting to the split gift provisions.[10] Absent those provisions, Mr. Proesel

[9] At oral argument, plaintiffs' counsel suggested that a contract enforceable against the Estate might be proved, based on reliance by third party beneficiaries. For the reasons developed *infra*, we reject this as insufficient to create a liability which would support a deduction under Section 2053.

[10] Plaintiffs have alleged that our holding will render meaningless the Regulation permitting an executor to consent to "split the gift" (Section 25.2513-2(c), note 14 *infra*). While this is not entirely

(footnote continued)

would have had to pay higher gift taxes, so that the community property aspect of the impact of the gift tax has been realized. This Regulation does not allow an estate tax deduction for a gift tax liability which the decedent remained free not to assume at the time of her death. Otherwise, as the Government states, "the estate tax would be imposed on something other than the transmission of the actual net estate as of the time of death" (Br. 17).

Plaintiffs' principal contention is that if Section 20.2053-4 is construed to bar an estate tax deduction for the late Mrs. Proesel, the provision of Section 20.2053-6(d) (note 4 *supra*), providing for deductibility of unpaid gift taxes when the "split gift" election has been made, would come into play in only two unimportant circumstances (Plaintiffs' Br. 18-20; Reply Br. 9 n. 7).[11] However, since our

(footnote continued)

germane to construing the Regulation before us, we do not in any event accept the plaintiffs' contention. First, they say that splitting the gift will not always result in a lower total gift tax liability. The answer to this, of course, is that in that case the Executor need not make the election. Second, the plaintiffs say that under our holding the Executor will be unable to consent because to do so would be a breach of his fiduciary obligation to the beneficiaries. To the extent that there is such a conflict (and there may not be, if splitting the gift results in no gift tax liability or if the Executor is the sole beneficiary or if the beneficiaries consent), it exists whether or not the gift taxes assumed by the Estate are deductible. It is true that the Estate will be depleted more if the gift taxes are not deductible, but in no event can it be in the beneficiaries' interest for the Estate to undertake to pay gift taxes not otherwise due. Surely a fiduciary's obligation is not measured by the magnitude of the expense he voluntarily incurs.

[11] In their reply brief, the plaintiffs agree that at least two other examples provided by the Government exist where Regulation Section 20.2053-6(d) as interpreted by the district court would apply (Reply Br. 9-10 n. 7).

affirmance is based on Section 20.2053-4, which plainly bars this deduction, we need not consider whether Section 20.2053-6(d) may be of somewhat limited applicability.[12]

Decedent's Pre-Death Intention to Consent Is Immaterial.

As an alternative argument, plaintiffs assert that summary judgment should not have been granted to the Government because they can show that decedent had agreed to the split gift treatment of her spouse's 1964 transfers prior to her August 12, 1965, death. They suggest first that they could show an agreement to split the gift which would be enforceable against the Estate. This is based on the theory that since the donees of the real estate were Proesel family members, a third party contract may have been formed for their benefit. But under Section 20.2053-4 of the Treasury Regulations, an agreement must be "for an adequate and full consideration in money or money's worth" to justify an estate tax deduction. This is true even if the agreement is enforceable under state law, as noted in *United States* v. *Stapf, supra,* 375 U.S. at 131: "a deduction under § 812(b) [the predecessor of Section 2053] should not be predicated solely on the finding that a promise or claim is legally enforceable under the state laws governing the validity of contracts and wills." In our view, plaintiffs' novel third-party-beneficiary theory, advanced only at oral argument, fails to meet the "money or money's worth" requirement.

[12] Section 20.2053-6(d) provides for the deductibility of gift taxes on gifts made by the decedent before his death or considered as made one-half each by the decedent and his spouse, under Section 2513. Since we hold that the gift is not "considered as made one-half by the decedent" because no consent was filed before her death, Section 20.2053-6(d) does not apply.

The plaintiffs, however, advance still another argument —that the authorization in Mrs. Proesel's will for her Executor to make the election establishes her pre-death consent. The language in Mrs. Proesel's will[13] on which plaintiffs rely however, did not establish a claim "enforceable against the decedent's estate" as also required by the same Treasury Regulation (Section 20.2053-4). The fact that "The executor * * * of a deceased spouse * * * may signify the consent" (Regulation § 25.2513-2(c))[14] does not show that Mrs. Proesel had agreed to the split gift treatment. Indeed it reinforces the Government's contention that at the time of her death she did not know whether her Executor would seek split gift treatment, even though he had the authority to do so.

[13] Article III, Section 6(p) of the will is set out at p. 2 *supra.*

[14] Section 25.2513-2 of the Treasury Regulations on Gift Tax provides in pertinent part:

> "(a)(1) Consent to the application of the provisions of section 2513 with respect to a calendar quarter (a calendar year with respect to gifts made before January 1, 1971) shall, in order to be effective, be signified by both spouses. If both spouses file gift tax returns within the time for signifying consent, it is sufficient if—
>
> "(i) The consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return;
>
> "(ii) The consent of each spouse is signified on his own return; or
>
> "(iii) The consent of both spouses is signified on one of the returns.
>
> * * * * *
>
> "(c) The executor or administrator of a deceased spouse, or the guardian or committee of a legally incompetent spouse, as the case may be, may signify the consent."

Finally, the plaintiffs urge that the Executor's authorized consent "relates back" to the date of death. However, to make decedent personally liable at the time of her death, as required by Section 20.2053-4 of the Regulations (note 3 *supra*), her consent had to be signified on her husband's return or on her own return, as provided by Section 25.2513-2(c) of the Regulations. Under unchallenged Rev. Ruling 70-600,[15] the consent had to be prior to her death, so that it is immaterial that under Section 25.2513-2(c) the executor of a deceased spouse may later signify the consent. It is also immaterial that Mrs. Proesel may have intended to consent, had she lived.[16]

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[15] Rev. Rul. 70-600 provides in pertinent part:

"* * * unpaid taxes are deductible, in accordance with section 20.2053-6(d), where the decedent made the gifts or where he consented *prior to his death* to the split gift treatment of his spouse's transfers." 1970-2 Cum. Bull. 194, 195.

[16] The plaintiffs' counsel contended at oral argument that Rev. Ruling 78-27 (1978-3 I.R.B. 11) and *Jones* v. *Commissioner*, 327 F.2d 98 (4th Cir. 1964), establish that consent may sometimes be "signified" other than by the signature of the consenting spouse on the requisite return. He offered to prove that Mrs. Proesel "signified" such consent by demonstrating her intention to file the consent form. The *Jones* case held that when the proper return was filed on time and the signature omitted, apparently inadvertently, this technicality would not invalidate the consent. Rev. Ruling 78-27, on the other hand, held that a timely consent signed for the wife by the husband, as an accommodation to her, was invalid. Both of these situations dealt only with the technical requirements of otherwise timely and valid consents. They provide no authority for equating a consent (through the timely filing of the return) with the bare intention to consent. This result is not unusually harsh. By analogy, a decedent might have manifested an unmistakably clear intent to make a gift, or even have made an enforceable agreement to make

(footnote continued)

For these reasons, the district court correctly concluded that there was no genuine issue of material fact needing resolution.

Judgment affirmed as to the estate tax deduction for gift taxes; judgment vacated and cause remanded for determination of plaintiffs' reasonable attorneys' fees.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(footnote continued)

a gift. But if the gift is not completed before death, we take it that the plaintiffs would not suggest that the gift could be excluded from the estate, even though it might in fact later be delivered to the intended donee. Similarly, in the present case, death cuts off the decedent's power to transfer the funds at issue (here the gift taxes she might otherwise have elected to pay) out of her estate.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 167

HENRY A. PROESEL and LASALLE NATIONAL BANK, Trustees of the Frieda Proesel Trust a/k/a Frieda Proesel Family Trusts), Transferees of the assets of the ESTATE OF FRIEDA PROESEL, Deceased; Henry A. Proesel, former executor of the ESTATE OF FRIEDA PROESEL,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

Presently pending are cross-motions for summary judgment. The action was brought by plaintiffs, a former executor and trust beneficiary and the trustees of the Estate of one Frieda Proesel (The Estate) to seek a refund of an alleged overpayment of federal estate taxes, together with interest. Alternatively, plaintiffs have asked that the matter be set for trial. I now deny this latter request because there appears to be no genuine issue of material fact which need be resolved: summary judgment is indeed appropriate at this time.

For the reasons set forth below, I hereby grant the Government's motion for summary judgment and deny a similar motion by the plaintiffs.

I.

In their complaint, plaintiffs urge that jurisdiction over the matter is grounded on 28 U.S.C. § 1346 (a)(1), and that The Estate had overpaid some $17,711.30 plus legal interest in federal estate taxes in its returns filed in 1966 and in 1967. Because an accurate depiction of the factual setting is necessary to comprehend the basis for such a charge, a brief summary is in order.

Frieda Proesel, decedent, was married to Henry A. Proesel until her death on August 12, 1965. Henry Proesel was thereafter appointed executor of his late wife's estate.

It seems that during calendar year 1964, Henry Proesel had made property gifts totalling $429,137.68; yet two gift tax returns filed that year totalled only $406,000. These returns indicated that one-half of such an amount was to be considered as being made by the decedent under Title 26 U.S.C. Section 2513,[1] (Internal Revenue Code.)

[1] § 2513 "Gift by husband or wife to third party," subsection (a) provides:

> "(1) In general. A gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in Section 2514(c), over such interest. For purposes of this section, an individual shall be considered as the spouse of an-

(footnote continued)

However, in 1966, the same Henry Proesel filed another gift tax return, but this time as the executor of his spouse's estate and reported the gift which decedent was considered theretofore as having made and paid the tax and interest due to the date of filing. In 1967, Henry Proesel, again as the executor of the Estate, filed a federal estate tax return, once more paying interest and taxes.

Upon examination of each of the three gift tax returns, the Internal Revenue Service Commissioner determined that the proper value of the property transferred as gifts by Henry Proesel as donor was actually $429,137.68 rather than $406,000. The additional taxes and interest which had accrued were later paid by Henry Proesel—but as executor of his wife's Estate rather than as donor. A claim for refund was thereafter disallowed by the Commissioner and this action followed.

(footnote continued)

other individual only if he is married to such individual at the time of the gift and does not remarry during the remainder of the calendar quarter."

"(2) Consent of both spouses. Paragraph (1) shall apply only if both spouses have signified (under the regulations provided for in subsection (b)) their consent to the application of paragraph (1) in the case of all such gifts made during the calendar quarter by either while married to the other."

§ 2513 (d) states:

"Joint and several liability for tax.

If the consent required by subsection (a) (2) is signified with respect to a gift made in any calendar quarter, the liability with respect to the entire tax imposed by this chapter of each spouse for such calendar quarter shall be joint and several."

Precisely stated, the issue presented here is whether under Section 2053 of the Internal Revenue Code,[2] plaintiffs' Estate may deduct from the estate tax return the federal gift taxes which were paid by the executor who was both the donor and the husband of decedent, after he had elected the "split gift tax" treatment under Section 2513 subsequent to his wife's death and in accordance with the intention expressed in her will. Through a "split gift", the executor consented to have the gifts he had made in 1964 as an individual donor treated as being made one-half by himself and one-half by his late spouse. Such a statute was designed to equalize beneficial treatment under federal tax laws of gifts by married couples who are residents of community property states with that afforded in common law jurisdictions. The latter are permitted to elect to divide the gift equally so as to, perhaps, lower their total tax liability.

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[2] § 2503. "Expenses, indebtedness and taxes.

(a) General rule.

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deciding from the value of the gross estate such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States under which the estate is being administered."

II.

Plaintiffs assert that the Estate is entitled to deduct from its return all federal gift taxes plus attorneys fees and interest which it paid. Under § 2513, once an election has been made and written consent is filed, the Internal Revenue Service may collect the entire tax from either spouse because liability is "joint and several." (§ 2513 (d)). They argue that such obligation is imposed by law and is a liability of the estate, particularly because under ch. 3 § 340 a of the *Ill. Rev. Stat.*,

> "Unless otherwise directed by the decedent in his will, an executor . . . shall have authority to join with the spouse of the decedent . . . in the making of a joint federal or state income tax return for the decedent . . . to the end that gifts to which consent is given shall be treated for Federal or State gift tax purposes as made one-half by the decedent . . . and one-half by his spouse. Any liability incurred by an executor . . . pursuant to any such joinder or consent shall be incurred on behalf of the estate of the decedent . . . and not individually."

Paragraph p of decedent's will specifically provided that her executor may choose, for federal gift tax purposes only, to consent to splitting any tax with her husband.

There is no disagreement as to the propriety of such consent. IRS Regulation 25.2513-2(c). However, it is the consequences which may flow from such an election which provokes dispute. Treasury Regulation § 20.2053-4 interprets subsection (3) of § 2053 of the Internal Revenue Code of 1954, "allowable claims" as only those claims which "represent personal obligations of the decedent existing at the time of his death, whether or not matured, and interest thereon which had accrued at the time of death."

In applying this Regulation to the record before me the IRS argues that the decedent was not personally liable for the additional gift taxes at the moment of her death on August 12, 1965. Her will was ambulatory, both parties agree, and spoke only at the time of her death. As to the additional value of the 1964 gifts, no gift tax return had yet been filed, no additional taxes had been paid, and no consent under § 2513 had yet been given by the executor until almost 5 months after decedent had passed away.

Federal gift taxes are generally the donor's liability according to the clear language of § 2502 (d) of the Internal Revenue Code. But § 6324 (b) provides, that "[i]f the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift."

I find that at the moment of her death, decedent was neither the donor nor the donee of any of the subject gifts made in 1964, notwithstanding the provisions of her will or of the Illinois Revised Statutes which permit an executor to make a split-gift choice.

Revenue Ruling 70-600 discusses this precise relation between an election under § 2513 and a deduction for gift taxes in a federal estate tax return filed pursuant to § 2053. Payment of the gift tax here was volunteered by the executor, who also happened to be the decedent's spouse and the original donor. No equitable principle is breached by the Commissioner refusing to permit such an individual, himself otherwise liable for the total amount of a gift tax and/or attorney's fee, to make such a voluntary deduction.

Admittedly, Revenue Rulings which interpret a section of the Internal Revenue Code need not be followed by a U. S. District Court nevertheless they are often found per-

suasive as representing the position of the Internal Revenue Service upon which plaintiffs generally have relied. Administrative determinations, especially by an agency with admitted specialized expertise, are not lightly to be disregarded.

I note that Treasury Regulation 20.2053-4 states "liabilities imposed by law . . . are deductible" while Regulation 20.2053-6 (d) provides

> "If a gift is considered as made one-half by the decedent and one-half by his spouse under § 2513, the entire amount of the gift tax, unpaid at the decedent's death, attributable to a gift in fact made by the decedent is deductible."
>
> "No portion of the tax attributable to a gift in fact made by the decedent's spouse is deductible except to the extent that the obligation is enforced against the decedent's estate and his estate has no effective right of contribution against his spouse."

No one disputes that Illinois does not permit a right of contribution in such situations. It should be fairly clear that, insofar as the additional gift taxes are concerned here, no such legal liability was "imposed" on the Estate until such time—decidedly after decedent's death —that consent to treat the matter under § 2513 was filed by the executor. And since I have found that the decedent was neither the original donor nor the donee of the subject gifts, it cannot be said that the tax was "enforced" against either decedent or against her estate. This is so even though I recognize that as Judge Leonard Hand so pointedly remarked "taxes are enforced exactions, not voluntary contributions." *Comm.* v. *Newman,* 195 F.2d 848 (2d Cir. 1947).

Payment was eventually made by the Estate after the executor's election under § 2513; presumably, such a decision came after careful research by counsel who sought to minimize the total amount of taxes to be paid but, as is often the case, the decision was tantamount to a gamble. I find, therefore, that in considering Regulation 20.2053-6 (d), which under certain conditions permits an amount to be deducted under § 2053, there was no gift tax obligation which was, at the time of decedent's death and when her will spoke, "enforced against the decedent's estate." "Enforced against the estate" means something quite different from a mere payment by the estate.

At the time of Frieda Proesel's death, there existed neither an enforceable nor a personal obligation nor was there any liability which the law then imposed, since decedent was neither donor nor donee of the 1964 gifts. Her apparent and to-now uncontroverted consent, as indicated in her last will and testament, to permit § 2513 treatment should her executor so choose, does not markedly change the complexion of the case nor my conclusion that the motion for summary judgment made by the Government as defendant must properly be, and it hereby is, granted. Plaintiffs' motion to set a trial date or for summary judgment as to liability is denied. Neither a refund nor attorneys fees are due to plaintiffs.

ENTER:

James B. Parsons

James B. Parsons

United States District Judge

October 11, 1977

INTERNAL REVENUE CODE

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

[Sec. 2053(a)]

(a) GENERAL RULE.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, and

(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

[Sec. 2053(b)]

(b) OTHER ADMINISTRATION EXPENSES.—Subject to the limitations in paragraph (1) of subsection (c), there shall be deducted in determining the taxable estate amounts representing expenses incurred in administering property not subject to claims which is included in the gross estate to the same extent such amounts would be allowable as a deduction under subsection (a) if such property were subject to claims, and such amounts are paid before the expiration of the period of limitation for assessment provided in section 6501.

[Sec. 2053(c)]

(c) LIMITATIONS.—

(2) LIMITATIONS APPLICABLE TO SUBSECTIONS (a) AND (b).—

(A) CONSIDERATION FOR CLAIMS.—The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; except that in any case in which any such claim is founded on a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in section 2055 for the purposes specified therein, the deduction for such claims shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under section 2055 if such promise or agreement constituted a bequest.

(B) CERTAIN TAXES.—Any income taxes on income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes, shall not be deductible under this section.

(2) LIMITATIONS APPLICABLE ONLY TO SUBSECTION (a).—In the case of the amounts described in subsection (a), there shall be disallowed the amount by which the deductions specified therein exceed the value, at the time of the decedent's death, of property subject to claims, except to the extent that such deductions represent amounts paid before the date prescribed for the filing of the estate tax return. For purposes of this section, the term "property subject to claims" means property includible in the gross estate of the decedent which, or the avails of which, would under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement

of the estate, except that the value of the property shall be reduced by the amount of the deduction under section 2054 attributable to such property.

* * *

SEC. 2501. IMPOSITION OF TAX.

[Sec. 2501(a)]

(a) TAXABLE TRANSFERS.—

(1) GENERAL RULE.—A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

* * *

SEC. 2513. GIFT BY HUSBAND OR WIFE TO THIRD PARTY.

[Sec. 2513(a)]

(a) CONSIDERED AS MADE ONE-HALF BY EACH.—

(1) IN GENERAL.—A gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in section 2514(c), over such interest. For purposes of this section, an individual shall be considered as the spouse of another individual only if he is married to such individual at the time of the gift and does not remarry during the remainder of the calendar quarter.

(2) CONSENT OF BOTH SPOUSES.—Paragraph (1) shall apply only if both spouses have signified (under the

regulations provided for in subsection (b)) their consent to the application of paragraph (1) in the case of all such gifts made during the calendar quarter by either while married to the other.

[Sec. 2513(b)]

(b) MANNER AND TIME OF SIGNIFYING CONSENT.—

(1) MANNER.—A consent under this section shall be signified in such manner as is provided under regulations prescribed by the Secretary.

(2) TIME.—Such consent may be so signified at any time after the close of the calendar quarter in which the gift was made, subject to the following limitations—

(A) the consent may not be signified after the 15th day of the second month following the close of such calendar quarter, unless before such 15th day no return has been filed for such calendar quarter by either spouse, in which case the consent may not be signified after a return for such calendar quarter is filed by either spouse;

(B) the consent may not be signified after a notice of deficiency with respect to the tax for such calendar quarter has been sent to either spouse in accordance with section 6212(a).

[Sec. 2513(c)]

(c) REVOCATION OF CONSENT.—Revocation of a consent previously signified shall be made in such manner as is provided under regulations prescribed by the Secretary, but the right to revoke a consent previously signified with respect to a calendar quarter—

(1) shall not exist after the 15th day of the second month following the close of such quarter if the consent was signified on or before such 15th day; and

(2) shall not exist if the consent was not signified until after such 15th day.

[Sec. 2513(d)]

(d) JOINT AND SEVERAL LIABILITY FOR TAX.—If the consent required by subsection (a)(2) is signified with respect to a gift made in any calendar quarter, the liability with respect to the entire tax imposed by this chapter of each spouse for such calendar quarter shall be joint and several.

ILLINOIS REVISED STATUTES, CHAPTER 110½—PROBATE.

27-7. § 27-7. *Joint tax returns.*) Unless otherwise directed by the decedent in his will, a representative may join with the spouse of the decedent or of the ward in the making of a joint federal or state income tax return for the decedent or ward and his spouse and to consent for federal or state gift tax purposes to gifts made by the spouse of the decedent or ward to the end that gifts to which consent is given are treated for federal or state gift tax purposes as made ½ by the decedent or ward and ½ by his spouse. Any liability incurred by a representative pursuant to any such joinder or consent is incurred on behalf of the estate of the decedent or ward and not individually.

TREASURY REGULATIONS

§ 20.2053-3 *Deduction for expenses of administering estate*—(a) *In general.* The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of § 20.2053-1) are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

* * *

§20.2053-4 *Deduction for claims against the estate; in general.* The amounts that may be deducted as claims against a decedent's estate are such only as represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death. Only interest accrued at the date of the decedent's death is allowable even though the executor elects the alternate valuation method under section 2032. Only claims enforceable against the decedent's estate may be deducted. Except as otherwise provided in § 20.2053-5 with respect to pledges or subscriptions, Section 2053(c)(1)(A) provides that the allowance of a deduction for a claim founded upon a promise or agreement is limited to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth. See § 20.-2043-1. Liabilities imposed by law or arising out of torts are deductible. [Reg. § 20.2053-4.]

* * *

§ 20.2053-6 *Deduction for taxes*—(a) *In general.* Taxes are deductible in computing a decedent's gross estate only as claims against the estate (except to the extent that excise taxes may be allowable as administration expenses), and only to the extent not disallowed by section 2053(c)(1)(B) (see the remaining paragraphs of this section). However, see § 20.2053-9 with respect to the deduction allowed for certain State death taxes on charitable, etc., transfers.

* * *

§ 20.2053-6 *Deduction for taxes*—(d) *Gift taxes.* Unpaid gift taxes on gifts made by a decedent before his death are deductible. If a gift is considered as made one-half by the decedent and one-half by his spouse under section 2513, the entire amount of the gift tax, unpaid at the decedent's death, attributable to a gift in fact made by the decedent is deductible. No portion of the tax attributable to a gift in fact made by the decedent's spouse is deductible except to the extent that the obligation is enforced against the decedent's estate and his estate has no effective right of contribution against his spouse. (See section 2012 and §20.2012-1 with respect to credit for gift taxes paid upon gifts of property included in a decedent's gross estate.)

* * *

§ 25.2513-1 Gifts by husband or wife to third party considered as made one-half by each. (a) A gift made by one spouse to a person other than his (or her) spouse may, for the purpose of the gift tax, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse was a citizen or resident of the United States. For purposes of this section, an individual is to be considered as the spouse of another individual only if he was married to such individual at the time of the gift and does not remarry during the remainder of the calendar quarter (calendar year with respect to gifts made before January 1, 1971). For the definition of calendar quarter see § 25.2502-1(c)(1).

(b) The provisions of this section will apply to gifts made during a particular calendar quarter (calendar year with respect to gifts made before January 1, 1971) only if both spouses signify their consent to treat all gifts made to third parties during that calendar quarter (or calendar year) by both spouses while married to each other as having been made one-half by each spouse. As to the manner

and time for signifying consent, see § 25.2513-2. Such consent, if signified with respect to any calendar quarter (or calendar year), is effective with respect to all gifts made to third parties during such calendar quarter or calendar year except as follows:

(1) If the consenting spouses were not married to each other during a portion of the calendar quarter or calendar year, the consent is not effective with respect to any gifts made during such portion of the calendar quarter or calendar year. Where the consent is signified by an executor or administrator of a deceased spouse, the consent is not effective with respect to gifts made by the surviving spouse during the portion of the calendar quarter or calendar year that his spouse was deceased.

(2) If either spouse was a nonresident not a citizen of the United States during any portion of the calendar quarter or calendar year, the consent is not effective with respect to any gift made during that portion of the calendar year.

(3) The consent is not effective with respect to a gift by one spouse of a property interest over which he created in his spouse a general power of appointment (as defined in section 2514(c)).

(4) If one spouse transferred property in part to his spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and hence severable from the interest transferred to his spouse. See § 25.2512-5 for the principles to be applied in the valuation of annuities, life estates, terms for years, remainders and reversions.

(5) The consent applies alike to gifts made by one spouse alone and to gifts made partly by each spouse, pro-

vided such gifts were to third parties and do not fall within any of the exceptions set forth in subparagraphs (1) through (4) of this paragraph. The consent may not be applied only to a portion of the property interest constituting such gifts. For example, a wife may not treat gifts made by her spouse from his separate property to third parties as having been made one-half by her if her spouse does not consent to treat gifts made by her to third parties during the same calendar quarter or calendar year as having been made one-half by him. If the consent is effectively signified on either the husband's return or the wife's return, all gifts made by the spouses to third parties (except as described in subparagraphs (1) through (4) of this paragraph), during the calendar quarter or calendar year will be treated as having been made one-half by each spouse.

(c) If a husband and wife consent to have the gifts made to third party donees considered as made one-half by each spouse, and only one spouse makes gifts during the calendar quarter (calendar year with respect to gifts made before January 1, 1971), the other spouse is not required to file a gift tax return provided: (1) The total value of the gifts made to each third party donee since the beginning of the calendar year is not in excess of $6,000, and (2) no portion of the property transferred constitutes a gift of a future interest. If a transfer made by either spouse during the calendar quarter (or calendar year) to a third party represents a gift of a future interest in property and the spouses consent to have the gifts considered as made one-half by each, a gift tax return for such calendar quarter (or calendar year) must be filed by each spouse regardless of the value of the transfer. (See § 25.2503-3 for the definition of a future interest.)

* * *

§ 25.2513-2 *Manner and time of signifying consent.* (a) (1) Consent to the application of the provisions of section 2513 with respect to a calendar quarter (a calendar year with respect to gifts made before January 1, 1971) shall, in order to be effective, be signified by both spouses. If both spouses file gift tax returns within the time for signifying consent, it is sufficient if—

(i) The consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return;

(ii) The consent of each spouse is signified on his own return; or

(iii) The consent of both spouses is signified on one of the returns.

If only one spouse files a gift tax return within the time provided for signifying consent, the consent of both spouses shall be signified on that return. However, wherever possible, the notice of the consent is to be shown on both returns and it is preferred that the notice be executed in the manner described in subdivision (i) of this subparagraph. The consent may be revoked only as provided in § 25.2513-3. If one spouse files more than one gift tax return for a calendar quarter (or a calendar year) on or before the due date of the return, the last return so filed shall, for the purpose of determining whether a consent has been signified, be considered as the return. (See § 25.6075-1 for the due date of a gift tax return.)

(2) Subject to the limitations of paragraph (b) of this section, the consent signified on a return filed for a calendar quarter will be effective for a previous calendar quarter of the same calendar year for which no return was filed because the gifts made during such previous calendar quarter did not exceed the annual exclusion provided by section

2503(b), if the gifts in such previous calendar quarter are listed on that return. Thus, for example, if A gave $2,000 to his son in the first quarter of 1972 (and filed no return because of section 2503(b) and gave a further $4,000 to such son in the last quarter of the year, A and his spouse could signify consent to the application of section 2513 on the return filed for the fourth quarter and have it apply to the first quarter as well, provided that the $2,000 gift is listed on such return.

(b)(1) With respect to gifts made after December 31, 1970, the consent may be signified at any time following the close of the calendar quarter in which the gift was made, subject to the following limitations:

(i) The consent may not be signified after the 15th day of the second month following the close of such calendar quarter, unless before such 15th day, no return has been filed for such calendar quarter by either spouse, in which case the consent may not be signified after a return for such calendar quarter is filed by either spouse; and

(ii) The consent may not be signified after a notice of deficiency with respect to the tax for such calendar quarter has been sent to either spouse in accordance with section 6212(a).

(2) With respect to gifts made before January 1, 1971, the consent may be signified at any time following the close of the calendar year, subject to the following limitations:

(i) The consent may not be signified after the 15th day of April following the close of the calendar year, unless before such 15th day no return has been filed for the year by either spouse, in which case the consent may not be signified after a return for the year is filed by either spouse; and

(ii) The consent may not be signified for a calendar year after a notice of deficiency in gift tax for that year has been sent to either spouse in accordance with the provisions of section 6212(a).

(c) The executor or administrator of a deceased spouse, or the guardian or committee of a legally incompetent spouse, as the case may be, may signify the consent.

(d) If the donor and spouse consent to the application of section 2513, the return or returns for the calendar quarter (calendar year with respect to gifts made before January 1, 1971) must set forth, to the extent provided thereon, information relative to the transfers made by each spouse. [*Reg.* § 25.2513-2]

* * *

§ 25.2513-4 *Joint and several liability for tax.* If consent to the application of the provisions of section 2513 is signified as provided in § 25.2513-2, and not revoked as provided in § 25.2513-3, the liability with respect to the entire gift tax of each spouse for such calendar quarter (calendar year with respect to gifts made before January 1, 1971) is joint and several. See paragraph (d) of § 25.2511-1. For the definition of calendar quarter see § 25.2502-1(c)(1). [*Reg.* § 25.2513-4.]

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The sole question presented in this federal estate tax case is whether an estate is permitted an estate tax deduction under Section 2053(a)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) with respect to gift taxes and interest paid pursuant to a "split gift" election made by the executor under Section 2513 of the Code and Treasury Regulations thereunder.

The pertinent facts are as follows: The decedent, Frieda Proesel, died on August 12, 1965 (Pet. App. 2). During 1964, decedent's husband made taxable gifts of real property valued at $429,137.68 (Pet. App. 2). Because of an extension of time granted by the Internal Revenue Service, he did not file a federal gift tax return for this period until January 3, 1966, several months after his wife's death (Pet. App. 2). At that

time, he filed his own individual gift tax return and, in his capacity as executor of his wife's estate, a gift tax return on behalf of the estate, electing "split gift" treatment of the gifts under Section 2513 of the Code (Pet. App. 2-3). The estate then sought to deduct the gift taxes and interest paid by it pursuant to this "split gift" election as a claim against the estate under Section 2053(a)(3) (Pet. App. 3-4). On audit, the Commissioner of Internal Revenue disallowed the deduction on the ground that the gift taxes and interest in question were not personal obligations of the decedent at the time of her death (Pet. App. 4). In this refund suit brought by the estate in the United States District Court for the Northern District of Illinois, the district court upheld the Commissioner's position that the gift taxes were not deductible by the estate as claims against the estate for estate tax purposes because the decedent had no enforceable obligation to pay such taxes at the time of her death. The court of appeals affirmed (Pet. App. 1-13).

1. The courts below correctly held that the gift taxes and interest were not deductible as claims against the estate under Section 2053(a)(3) of the Code. The pertinent Treasury Regulations expressly provide that the only claims deductible under Section 2053(a)(3) are those which "represent personal obligations of the decedent existing at the time of his death, whether or not then matured, and interest thereon which had accrued at the time of death." Treasury Regulations on Estate Tax, Section 20.2053-4 (26 C.F.R.). As the court of appeals observed (Pet. App. 6-7), petitioners do not challenge the validity of this Regulation, which was first promulgated 60 years ago under the provisions of the Revenue Act of 1918, ch. 18, 40 Stat. 1057,[1] and approved by this Court in *United States* v.

[1]See Treasury Regulations 37 (1919 ed.), Art. 45.

Stapf, 375 U.S. 118, 132 (1963). Thus, for purposes of this case, the controlling fact is that at the time of her death, the decedent had not assumed personal liability for any portion of the gift taxes imposed by the Code with respect to the gifts made by her husband in 1964.

Section 2513 was enacted in order to reduce the impact of the difference between the gift tax imposed in the case of gifts of community property and the tax imposed on transfers of property owned by one spouse or the other in common law states. See H.R. Rep. No. 1274, 80th Cong., 2d Sess. 24-26 (1948); S. Rep. No. 1013, 80th Cong., 2d Sess. 26-28 (1948). The statute permits spouses to elect to treat a gift made by either of them as a "split gift," *i.e.*, one-half made by the husband and one-half by the wife, thereby reducing the overall rate of the gift tax. The "split gift" provisions, however, apply only where both spouses consent to the election in the manner prescribed by the pertinent Treasury Regulations under Section 2513(a)(2) and (b). The Regulations provide that such consent to elect split gift treatment must be made on gift tax returns filed by the husband or wife (or both), and that the executor or administrator of a deceased spouse may give the requisite consent. Treasury Regulations on Gift Tax, Section 25.2513-2(a)(1) and (c) (26 C.F.R.). Here, the decedent's husband gave such consent to split gift treatment on the gift tax return in his capacity as her executor. But the critical fact for purposes of this case, involving the deductibility of the taxes as a claim against the estate, is that the decedent did not personally consent to the gift tax liability prior to her death. Since an enforceable claim against her estate did not arise until the gift tax return was filed on January 3, 1966, the taxes are not deductible as a claim that existed at the time of death.

2. Without specifically challenging the validity of Section 20.2053-4 of the Treasury Regulations, or the correctness of the lower courts' ruling that decedent herself had not, at the time of her death, assumed personal liability for the gift taxes here in question, petitioners argue (Pet. 5) that the decision below unconstitutionally discriminates between residents of community property states and those in common law property states. But it has long been recognized that gifts of community property, or income from community property, would not be subject to tax on the same basis as gifts of, or income from, property owned by individual spouses in common law jurisdictions. While Congress has sought to minimize these differences as they affect federal estate, gift and income taxes, it has never been thought that it was compelled to do so as a matter of constitutional precept, or that a statutory scheme which does not achieve a perfect equality between the residents of community property states and the residents of non-community property states would be subject to constitutional defect. As this Court recently observed in a similar context in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 41 (1973): "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free from all discriminatory impact." See also *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 24-25 (1916); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583-584 (1937).

3. Petitioners further argue (Pet. 5) that the decision below violates the intent of Congress in enacting the split gift provision. But the legislative history accompanying the enactment of Section 2513 shows that Congress specifically "recognized that complete equalization of the estate and gift taxes cannot be achieved because of the inherent differences between

community property and noncommunity property." S. Rep. No. 1013, *supra*, at 27. Moreover, as the court of appeals pointed out (Pet. App. 8-9), the fact is that decedent's husband and her estate fully enjoyed the specific benefit Congress intended to confer under these "split gift" provisions—*i.e.*, "to have the gift treated [for gift tax purposes] as though each had made one-half of the gift." H.R. Rep. No. 1274, *supra*, at 26.

Jones v. *Commissioner*, 327 F. 2d 98 (4th Cir. 1964), upon which petitioners rely (Pet. 6-7), is not to the contrary. There, the court held that although the taxpayer's wife had not signed the "Consent of Spouse" form attached to the gift tax return, the return sufficiently manifested the wife's consent to the split gift because she had signed the consent form on prior returns. Here, on the other hand, no gift tax returns signifying either spouse's consent in any fashion had been filed prior to the decedent's death. At best, she had merely expressed an intention (which she remained free to disavow at any time) eventually to consent to the application of these provisions. Thus, at the time of the decedent's death, she was not subject to personal liability for these gift taxes. They were accordingly not a deductible claim against the estate.[2]

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[2]The question presented in this case has been eliminated by Section 2001(a)(5) and (d)(1) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848, 1854. The new legislation added Section 2035(c) to the Code, which effectively denies an estate the benefit of a deduction as a result of the payment of federal gift taxes on any gift made within three years of the decedent's death.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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